IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-607

ADVOCATES FOR THE HANDICAPPED, AN ILLINOIS CORPORATION AND DENNIS KLAPACZ, ON HIS OWN BEHALF AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Petitioner,

vs.

SEARS, ROEBUCK AND CO., A NEW YORK CORPORATION,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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To the Honorable Chief Justice and Associates Justices of the Supreme Court of the United States:

Respondent, Sears Roebuck and Co., pursuant to Rule 24 of this Court [U. S. Sup. Ct. Rule 24, 28 U. S. C.], respectfully submits this brief in opposition to the Petition for Writ of Certiorari and prays that for the reasons stated herein said petition should be denied.

OPINION BELOW.

The opinion of the Appellate Court of Illinois, First District is reported at 67 Ill. App. 3d 512, 385 N. E. 2d 39 (1978).

JURISDICTION.

The jurisdictional requisite which Petitioners advance has not been satisfied. This case involves no federal question. Moreover, Petitioners made no attempt to raise a purported federal question until after the Illinois Supreme Court had denied their petition for leave to appeal.[1] That belated attempt was not timely and, therefore, no federal question is preserved for review, even if one existed.

QUESTIONS PRESENTED.

The questions appearing under the heading "Questions Presented" in the Petition do not accurately represent the issues. Rather, Respondent submits that the real issues involved in this case are:

1. Whether the single issue decided by the Illinois courts, to wit, whether Petitioner Klapacz was physically handicapped within the meaning of the Illinois Equal Opportunities for the Handicapped Act, involves a federal question.

2. Whether Petitioner raised the purported existence of any federal question below so that it is preserved for review by this Court in any event.

STATEMENT OF THE CASE.

The Petitioners filed suit against Respondent Sears, Roebuck and Co. in the Circuit Court of Cook County, Illinois, seeking relief under the Illinois Equal Opportunities for the Handicapped Act, Ill. Rev. Stat. Ch. 38 §§ 65-21, *et seq.* (hereinafter "the

1. Petitioners denominated their final attempt for state court review, after their petition for leave to appeal was denied, a "petition for reconsideration." However, it was filed pursuant to Illinois Supreme Court Rule 367—"Rehearing in Reviewing Court" [Ill. Rev. Stat. Ch. 110A, § 367]. Under this rule such a paper is called a "petition for rehearing." Accordingly, Respondent will refer to this petition as one for "rehearing," rather than "reconsideration."

Act"). Petitioners did *not* raise any federal statutory or constitutional claims in their initial complaint or their amended complaint. Respondent moved to strike and dismiss the original and amended complaints, and the Circuit Court so ordered on the ground that Petitioner Klapacz was not "handicapped" within the meaning of the Act.[2]

Petitioners appealed the trial court's order to the Appellate Court of Illinois. They raised no purported federal question in their arguments to that Court. The Appellate Court affirmed the trial court's ruling that Petitioner Klapacz was not handicapped within the meaning of the Act. Its decision involved no federal question.

Petitioners next sought review in the Supreme Court of Illinois by filing a petition for leave to appeal. Here too, Petitioners raised no federal claims. The Supreme Court denied the petition.

Finally, after their petition for leave to appeal had been denied, Petitioners petitioned the Illinois Supreme Court for a rehearing. It was not until this final state court paper was filed, some years after the original complaint, that Petitioners so much as suggested that their claim involved a federal question.[3] The Supreme Court of Illinois denied this final petition for rehearing. Under Illinois law, issues not previously raised may not be entertained upon a petition for rehearing.

2. A motion to dismiss admits all well-pleaded facts stated in the complaint under Illinois law. *Stenwall* v. *Bergstrom,* 398 Ill. 377 (1947) *Eckhoff* v. *Forest Preserve District,* 377 Ill. 208 (1941). Since Respondent thus admitted all the facts raised in the complaint, including the details of Klapacz' physical condition, it is impossible for Respondent to understand how Petitioners can seriously contend that their due process rights have been violated because they were "denied an evidentiary hearing" below.

3. The petition for rehearing asserted, *inter alia,* a vague and general claim of denial of equal protection. An "equal protection" claim is also contained in the Petition for Writ of Certiorari. However, not one of the other purported federal questions asserted in the Petition for Writ of Certiorari was *ever* raised in *any* fashion before the Illinois courts. (See note 5, *infra*)

It is thus clear that the only questions involved in this case are questions of state law. The Illinois courts' decisions were based wholly on state law, with no allusion to any federal questions and Petitioners' untimely, indeed desperate, attempt to argue a purported federal question cannot change the facts. This Petition for Certiorari is merely an improper and belated attempt to convert a simple factual question—whether Petitioner Klapacz is handicapped within the meaning of Illinois law—into a purported violation of a federally protected right. The attempt should not be permitted to succeed.

ARGUMENT.

I.

This Case Does Not Involve a Federal Question.

Throughout the proceedings below, the Illinois courts dealt with only one substantive issue, i.e. whether Petitioner Klapacz was handicapped within the meaning of Illinois law. The Illinois courts were called upon to construe and interpret only an Illinois statute,[4] not a federal statute or any right allegedly arising under federal law or the United States Constitution. This Court has repeatedly held that it will not review a state court's interpretation of its own statutes and will not substitute its own judgment for that of a state court.

> This Court is bound by the interpretation given to [a state] statute by the Supreme Court of that State . . . *First National Bank of Garnett* v. *Ayers*, 160 U. S. 660, 665 (1896).

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4. It is doubtful that even a state constitutional issue was ever reached by the lower courts, as Petitioners also contend. The trial court simply held that Klapacz was not "physically handicapped" within the meaning of the Act. The Appellate Court clearly held that it was affirming the trial court's ruling that Klapacz was not "physically handicapped." Although the Appellate Court also mentioned that ". . . Klapacz was not physically handicapped within the meaning of . . . Article I, Section 19 of the Illinois constitution . . . ," this language obviously had no effect upon its holding affirming the trial court's ruling that Klapacz was not handicapped within the meaning of the Act. The Illinois Supreme Court well understood this when it denied Petitioners' leave for appeal. In any event, this Court has held that interpretation of state constitutions, like state statutes, is within the exclusive province of the state courts, *Atty. General* v. *Lowrey*, 199 U. S. 233 (1905); *Lombard* v. *West Chicago Park*, 181 U. S. 33 (1901); it is, of course, equally well settled that courts will decide a constitutional question *only* where it is necessary to decide the case. *Rescue Army* v. *Municipal Court*, 331 U. S. 549 (1947); *District of Columbia* v. *Little*, 339 U. S. 1 (1949); *City of Detroit* v. *Gould*, 12 Ill. 2d 297 (1957); *People ex rel. Downs* v. *Scully*, 408 Ill. 556 (1951).

* * * * *

> What the statutes of a State mean, the extent to which any provision may be limited by other parts of the same Act, are questions on which the highest court of the State has the final word. The right to speak this word is one which State courts should jealously maintain and which we should scrupulously observe. *Musser* v. *Utah*, 333 U. S. 95, 98 (1948).

* * * * *

> We are, of course, bound to accept the interpretation of [state] law by the highest court of the State. *Hortonville Joint School Dist. No. 1* v. *Hortonville Education Assn.*, 426 U. S. 482, 488 (1976).

There can be no doubt that Petitioners' request for Certiorari is simply an improper plea that this Court substitute a different interpretation of Illinois law in lieu of that which three Illinois courts have carefully ascribed. In essence, what Petitioners contend is that the Illinois courts' interpretation of "handicapped" for purposes of the Illinois Act is wrong because Klapacz is not included within that definition.

To be sure, Respondent believes the Illinois courts correctly decided that Petitioner Klapacz, whose sole restriction was a limitation of heavy lifting, was not "physically handicapped" within the meaning of Illinois law. But of even more importance, such questions are routinely decided by state courts and not reviewed by this Court simply because the statute might be susceptible to a different interpretation. The fact that other states may have chosen to interpret their statutes differently than Illinois creates neither a "federal question" nor a "special or important reason" to grant Certiorari. Indeed this Court has uniformly recognized that state courts are not required to construe similarly worded statutes in the same fashion.

> [W]hen a statute of two states, expressed in the same terms is construed differently by the highest courts, they are treated by us as different laws, each embodying the particular construction of its own state, and enforced in accordance with it in all cases arising under it.

Supreme Lodge, Knights of Pythias v. *Meyer*, 265 U. S. 30, 35 (1924) (quoting *Louisiana* v. *Pilsbury*, 105 U. S. 278, 294 (1881). Hence, the fact that other jurisdictions may have interpreted their own statutes differently than Illinois simply provides no grounds at all for this Court to grant review.

At the risk of repetition, but in the hope of clarity, Respondent once again quotes this Court:

> We have repeatedly held that *it is essential to the jurisdiction of this Court in reviewing a decision of a court of a state that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the state having jurisdiction but that its decision of the federal question was necessary to the determination of the cause; that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it.* (emphasis supplied)

Southwestern Bell Telephone Co. v. *Oklahoma*, 303 U. S. 206, 212-13 (1937). There is simply no doubt that Petitioners cannot meet the basic and well established requirements for review by this Court. Thus, the Petition for Writ of Certiorari should be denied.

II.

Petitioners Did Not Timely Raise a Purported Federal Question Below.

As shown above, there is simply no federal question involved in this case. However, assuming *arguendo*, that it could be said a federal question was a part of this case, still Certiorari would not lie. Clearly, Petitioners have not met the additional

requirement that a federal question must be first timely raised in the lower courts before it will be considered by this Court.

The Petition for Certiorari attempts to mask exactly when an alleged federal question was first raised below. But this attempt to obfuscate the record is found wanting upon examination of Petitioners' initial and amended complaints, their briefs before the Illinois Appellate Court, and their petition for leave to appeal to the Supreme Court of Illinois. Nowhere in this myriad of papers did Petitioners so much as suggest the existence of any federal question.

Uniformly unsuccessful in their state law arguments, Petitioners then belatedly attempted to assert, for the first time, a purported federal question in their petition for rehearing to the Supreme Court of Illinois.[5]

But, this Court has held that the

> [f]ailure to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review in this Court, so long as the state has a legitimate interest in enforcing its procedural rule . . . *Michigan* v. *Tyler*, 436 U. S. 499, 512, n.7 (1978). (Also: *Newsom* v. *Smyth*, 365 U. S. 604, 605 (1961).)

and, under Illinois procedure and law, new questions cannot be raised for the first time in a petition for rehearing. If a question has not been raised before, it is deemed to have been waived. Thus, the Rules of the Supreme Court of Illinois provide:

> Appellant's Brief. The appellant's brief shall contain the following parts in the order named:
>
> * * *
>
> Argument . . . *Points not argued* [*in Appellant's brief*] *are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing.* Ill. Rev. Stat. Ch. 110A, § 341(e)(7). (emphasis supplied)

5. The claim was a vague and general allegation that equal protection had been denied. While the Petition for Certiorari asserts an "equal protection" claim, it also asserts several other purported federal questions, *none* of which were *ever* presented to the Illinois courts in *any* fashion. (See note 3, *supra.*)

> * * *
>
> Rehearing in Reviewing Court.
>
> Contents. The petition shall state briefly the points claimed to have been overlooked or misapprehended by the court, with proper reference to the particular portion of the record and briefly relied upon, and with authorities and argument, concisely stated in support of points. Reargument of the case shall not be made in the petition. Ill. Rev. Stat. Ch. 110A, § 367(c).

The Illinois courts have applied the rule precluding the use of a petition for rehearing to raise new issues in numerous situations, *including that of a question bottomed upon the federal constitution.* Thus, in *People* v. *Mallett*, 45 Ill. 2d 388, 397-98 (1970) the Illinois Supreme Court refused to consider an argument that appointed trial counsel had been incompetent, raised for the first time in a petition for rehearing, and held:

> By our rules and decisional law a new contention cannot, for the first time, be urged in a petition for rehearing. Rule 367(b) specifically provides for rehearing only on those 'points claimed to be overlooked or misapprehended by the court' in its original opinion. Having failed to raise this contention on [appellant's] original hearing, [appellant] may not urge it on rehearing. (citations omitted)

See also: *Scott* v. *Scott*, 307 Ill. 586 (1923), *Chicago Park Dist.* v. *Kenroy Inc.*, 58 Ill. App. 3d 879 (1978), and *People* v. *Krueger*, 237 Ill. 357 (1908), involving and rejecting a belated attempt to raise a question under the Illinois constitution.

Obviously, Petitioners failed to timely raise the existence of a purported federal question before the Illinois courts. Accordingly, they would be barred from making such an assertion here, even if it could somehow be said that a federal question existed.

CONCLUSION.

There is no federal question here, either involved or preserved; nor are there novel or unique issues. All this case involves is the application of state law to the individual facts before the courts below. Respondent respectfully urges that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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